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STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DANE COUNTY

RALPH JACOBSEN,

Petitioner,

v.

STATE PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER
Case no. 92-CV-4574

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Petitioner,

v.

STATE PERSONNEL COMMISSION,

Respondent.

Case no. 93-CV-0097

This is a consolidated case arising out of petitioner, Ralph Jacobsen's (Jacobsen), employment at the Wisconsin Council on Developmental Disabilities in the Department of Health and Social Services. Jacobsen and petitioner, Wisconsin Department of Health and Social Services (department), seek judicial review under ch. 227, Stats., of a decision and order of the Wisconsin State Personnel Commission (commission), ordering Jacobsen reinstated to his former position with back pay pursuant to ch. 230, Stats., but dismissing Jacobsen's Fair Employment Act claim. The commission found the department "indefinitely suspended" Jacobsen without just cause but that it did not due so because of a perceived handicap. Jacobsen contends the

commission's finding as to his perceived handicap is a prejudicial error of law but that it was correct in its interpretation of §230.37(2). The department claims the commission erroneously interpreted Wis. Stat. sec. 230.37(2), but correctly found Jacobsen did not qualify as handicapped within the Fair Employment Practices Act. For the reasons set out below, I affirm the commission's decision and dismiss these actions.

BACKGROUND

The facts underlying the dispute are basically undisputed and are set out in detail in the commission's decision. The department employed Jacobsen from 1986 until 1991 in the Wisconsin Council on Developmental Disabilities (WCDD). Jacobsen worked as a Management Information Specialist 3. WCDD considered Jacobsen's technical work performance good with Jacobsen achieving an "Exceeds Expectations" rating on his last performance evaluation. However, Jacobsen's interpersonal interactions in the work place were less than desirable.

Jacobsen would listen to the radio at work and engage others in his office in conversations regarding current events of the day. Although some fellow employes would engage willingly in these conversations, over time, the frequency of the conversations and aggressiveness of Jacobsen increased to the point where many co-workers became uncomfortable with him. Many felt intimidated by his confrontational behavior.

Finally, on October 11, 1991, Jacobsen's actions led a co-worker to complain to Jacobsen's supervisor. The supervisor instructed Jacobsen to turn off his radio and stop disturbing others in the office. Jacobsen complied, but returned to inform the supervisor he considered the instruction a form of harassment.

Because of Jacobsen's agitated and aggressive demeanor, a meeting was held involving

the supervisor, WCDD's executive director and department personnel. During this meeting, it was decided to remove Jacobsen from employment on pay status until he submitted to a psychological examination pursuant to §230.37(2), Stats.

Dr Eric Hummel, a licensed clinical therapist, conducted a psychological evaluation on Jacobsen. Hummel found Jacobsen's psychological status within normal range but also found that he had certain personality characteristics that contributed to the problems at work. He opined that these characteristics keep Jacobsen from interacting in other than a non-inflammatory way. He further concluded that Jacobsen was not physically dangerous.

Based on Hummel's report, WCDD's executive director informed Jacobsen that he could not return to work until he obtained counseling and that after November 7, 1991, Jacobsen would be required to use sick or other leave time.

Jacobsen also met three times with Dr. Peter Weiss, a licensed clinical psychologist. Weiss' assessment placed Jacobsen within normal limits. Weiss opined that he could see no reason why Jacobsen could not return to work. However, Weiss did not address whether Jacobsen posed a threat of physical harm.

Jacobsen was further assessed by Darald Hanusa, MSSW, a specialist in the treatment of anger. Hanusa determined Jacobsen did not have a "psychiatric syndrome" but did have "interpersonal behavior difficulties" which created difficulties in the work environment. Hanusa suggested Jacobsen could benefit from anger and hostility treatment. Based upon this, the decision was reached to allow Jacobsen to return to work as long as he participated in a 24 session treatment regime monitoring his progress. However, Hanusa and Jacobsen terminated their therapeutic relationship as a result of Jacobsen's angry refusal to sign a treatment contract.

As a result of the dissolution of the treatment program and the failure of Dr. Weiss to adequately assure Jacobsen's supervisor that he did not pose a threat, Jacobsen was not allowed to return to work.

STANDARD OF REVIEW

This court must affirm the commission's decision "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [sec. 227.57, Stats.]." Section 227.57(2), Stats. If the court finds the commission has "erroneously interpreted a provision of law and a correct interpretation compels a particular action" the court shall set aside or modify the action. Section 227.57(5), Stats. The court must accord due weight to "the experience, technical competence, and specialized knowledge" of the commission, as well as "discretionary authority conferred upon it." Section 227.57(10), Stats.

The commission's findings of fact must stand if supported by substantial evidence in the record. Section 227.57(6), Stats. "Substantial evidence has been defined to be that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." Boynton Cab Co. v. ILHR Dep't., 96 Wis. 2d 396, 405 (1980).

The facts are undisputed and the resolution of the case turns on an application of a statute to a known set of facts. This presents a question of law. Phillips v. Personnel Comm., 167 Wis. 2d 205, 215-16 (Ct. App. 1992). Although, the court is not bound by the commission's interpretations of law, Local No. 695 v. LIRC, 154 Wis. 2d 75, 82 (1990), our Supreme Court set out three levels of deference a court may give to an agency's conclusions of law and statutory interpretation as summarized in Jicha v. DILHR, 169 Wis. 2d, 284, 290-91 (1992):

> First, if the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight". The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing". The lowest level of review, the de novo standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. (Emphasis in original; citations omitted).

The department vehemently argues the commission lacked the requisite expertise and experience to interpret §230.37(2), Stats., and thus the de novo standard is applicable to that claim. The commission and Jacobsen maintain the commission's interpretation of the statute should be afforded "great weight" under the standards set forth above. In its Ruling on Costs and Final Order, the commission admits that it was dealing with a case of first impression in interpreting §230.27(2). However, the department points out in its Objection to Proposed Decision and Order that the commission has interpreted §230.27(2) on at least one other occasion, Smith v. DHSS, Case No. 88-0063-PC.

I find that the commission's decision construing §230.37(2) as well as its interpretation of the Fair Employment Act is entitled to due weight, the second level of deference, for several reasons: First, the commission has experience interpreting personnel decisions under Wisconsin Civil Service Law ch. 230 and although this is very nearly a case of first impression, it is not one of first impression. Second, "in the area of employment relations in state government, the commission has some degree of expertise." Seep v. Personnel Comm., 140 Wis. 2d 32, 39 (1987). Finally, the legislature specifically charged the commission with the duty of administering §230.37(2). Section 230.44(1)(c), Stats., and the commission is charged by the legislature with the duty of hearing and deciding discrimination claims and applying the

provisions of the Fair Employment Act to particular cases. Section 111.375(2), Stats.; Phillips, 167 Wis. 2d at 216. Normally, "[w]hen an agency construes a statute it is charged with applying, that construction is entitled great weight and [the court] defer[s] to it unless it is unreasonable." Board of Regents v. Personnel Comm., 147 Wis. 2d 406, 410 (Ct. App. 1988). This supports the position that the commission's interpretation is at least entitled to due weight.

DISCUSSION

A. 230.37(2), STATS.

The department asserts that it was justified in "indefinitely suspending" Jacobsen under §230.37(2)[1] claiming he had become "incapable or unfit for the efficient and effective performance" of his duties because of his "ingrained personality characteristics"[2]. The commission held that although Jacobsen's "ingrained personality characteristics" impeded his efficient and effective job performance, it did not amount to "infirmities due to age, disabilities,

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[1]Section 230.37(2), Stats. provides:

> (2) When an employe becomes physically or mentally incapable or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities or otherwise, the appointing authority shall either transfer the employe to a position which requires less arduous duties, if necessary demote the employe, place the employe on a part-time service basis at a part-time rate of pay or as a last resort, dismiss the employe from the service. The appointing authority may require the employe to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employe may otherwise be eligible.

[2]These characteristics are described as "irritability, argumentativeness, and a pattern of allaying blame to others."

or otherwise" using the commonly accepted meaning of these terms.

To fall under the auspices of §230.37(2) an employe must meet three elements: The employe must have (1) "infirmities due to age, disabilities or otherwise"; (2) must be "physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position"; and (3) the incapability or unfitness must be causally related to the infirmity. §230.37(2) also sets out specific avenues the department must take in trying to accommodate the employe. As a last resort, the statute permits a department to dismiss the employe.

1. Infirmity due to age, disability, or otherwise.

There are no statutory definitions of "infirmities due to age, disabilities, or otherwise" available in ch. 230. The commission turned to the dictionary definitions of infirmity[3] and disability[4] and concluded that Jacobsen's personality characteristics should be considered "commonplace" rather than infirmities. The commission followed "the well-established rule of statutory construction that nontechnical words and phrases are to be construed according to their common and ordinary usage." State ex rel. B'nai B'rith Found. v. Walworth County, 59 Wis. 2d 296, 307 (1973).

The department points to the language "or otherwise" to expand the class of conditions which would qualify as an infirmity. Included in the department's definition of "infirmity" would be conditions which "are internal to the individual and outside the individual's voluntary

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[3] "[A]n unsound, unhealthy, or debilitated state."

[4] "[D]eprivation or lack esp. of physical, intellectual or emotional capacity or fitness ... the inability to pursue an occupation or perform services for wages because of physical or mental impairment."

control." The commission concluded that such a broad definition of "infirmities due to age, disabilities, or otherwise" would lead to absurd results and declined to adopt this interpretation.[5] Statutes should be interpreted to avoid absurd and unreasonable results. Kwiatkowski v. Capitol Indem. Corp., 157 Wis. 2d 768, 775 (Ct. App. 1990).

It is not unreasonable to conclude that "irritability, argumentativeness, and a pattern of allaying blame to others" does not constitute an infirmity that the legislature intended to be included within the meaning of §230.37(2). Such personality traits may make Jacobsen incapable of effectively performing his duties at work. However, as the commission noted in its Decision and Order, this case hinged on the difference between behavioral difficulties and mental conditions. It would be an unreasonable interpretation of the term "or otherwise" to encompass all internal conditions which might affect an employe which are out of the employe's voluntary control. It is a reasonable conclusion that Jacobsen's traits were commonplace and did not rise to the level of an infirmity. Though I give due weight to the commission's conclusion, I agree with that conclusion. Thus, having established Jacobsen did have not an infirmity under the statute, I do not reach the issue of the causal connection between the infirmity and Jacobsen's job performance.

2. Inclusio unius est exclusio alterius

Assuming, arguendo, Jacobsen's condition was an infirmity, the department acted beyond its authority when it indefinitely suspended him because of that infirmity. The commission

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[5]The commission cites examples such as manual dexterity or intelligence as internal conditions outside an individual's voluntary control to show the absurdity of results which could occur if the department's definition of "or otherwise" were held to be within the meaning of infirmity.

examined the language of §230.37(2) and decided under the doctrine of inclusio unius est exclusio alterius[6] that Jacobsen's "indefinite suspension" was not an option available to the department. Since the legislature expressly set out only four options -- to transfer, to demote, to reduce to part time status or to dismiss -- it explicitly chose not to include suspension. The department was, therefore, limited to only those four options. This is a reasonable interpretation given the plain meaning of the statute. Hence, even if Jacobsen's condition amounted to an infirmity under the statute, the department's actions were beyond its authority and the commission's decision must stand.

Therefore, because the department did not have just cause to terminate Jacobsen under §230.37(2) and the "indefinite suspension" was not an available option under §230.37(2), the commission's decision will be upheld.

B. FAIR EMPLOYMENT ACT

The commission held that the department did not violate the Wisconsin Fair Employment Act (§111.31 et seq.) because Jacobsen's condition did not amount to an "impairment" under the Act.[7] Jacobsen has the burden of proving that he is handicapped within the meaning of the Act. Boynton Cab Co. v. ILHR Dep't, 96 Wis. 2d 396, 406 (1980). Whether Jacobsen is "handicapped" presents a question of law and this court must determine whether there is a

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[6]The inclusion of one is the exclusion of another.

[7]Section 111.32(8), Stats., provides:
(8) "Handicapped individual" means an individual who:
(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
(b) Has a record of such impairment; or
(c) Is perceived as having such an impairment.

rational basis for the commission's conclusion that he was not handicapped. La Crosse Police Comm. v. LIRC, 139 Wis. 2d 740, 755-56 (1987). The court employs a two-step analysis to determine whether an individual is handicapped within the meaning of the Act.

> First, is there a real or perceived impairment? Second, if so, is the impairment such that it either actually makes or is perceived as making achievement unusually difficult or limits the capacity to work.
>
> The first step in the analytical process requires determining whether an impairment, real or perceived, exists. As stated above, an impairment for the purposes of the statute is a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or such bodily condition.
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> If the individual satisfies the first step, then he or she must establish that the impairment either actually makes or is perceived as making "achievement unusually difficult or limits the capacity to work." Section 1211.32(8)(a), Stats. ... An employer's perception of either satisfies this element as well.

Id. at 761. Thus, if the department perceived Jacobsen's condition as one which lessened, deteriorated or damaged his normal functioning and that the condition made achievement unusually difficult or limited Jacobsen's capacity to work, Jacobsen would satisfy both steps of the analysis.

In American Motors Corp. v. LIRC, 119 Wis. 2d 706 (1984), the supreme court clarified the difference between mere deviations from the norm and handicaps.

> "All persons, given their individual characteristics and capabilities, have inherent limitations on their general ability to achieve or perform certain jobs. All persons have some mental or physical deviations from the norm. However, such inherent limitations or deviations from the norm do not automatically constitute handicaps. A handicap is a mental or physical disability or impairment that a person has in addition to his or her normal limitations that make achievement not merely difficult, but unusually difficult, or that limits the capacity to work." Id. at 713-14. (Emphasis in original).

The commission held that the department did not perceive Jacobsen to have a mental

impairment which would constitute a handicap under the statute.[8] Rather, it held the department knew Jacobsen had certain inherent personality characteristics which may have deviated from the norm but that his psychological makeup was within normal limits. Without more, an irritable and argumentive employe cannot be said to have a handicap.[9]

Jacobsen fails to sustain his burden of proving the department perceived his behavioral problems as an impairment beyond that of a normal limitation. It did view his behavior unacceptable in the work place. The specialists that evaluated Jacobsen characterized his behavior as inflammatory and difficult. His behavior made his coworkers uncomfortable. Some felt intimidated. But the department did not view Jacobsen's personality traits as making achievement of his duties unusually difficult. Indeed, Jacobsen received performance evaluations which showed he was not limited in his capacity to work. The opposite was true. He excelled in his performance.

Accordingly, I find the commission's decision that the department did not perceive Jacobsen to have a mental impairment which would qualify as a handicap under the Act rational and supported by substantial evidence in the record. He was a problem employe with behavioral difficulties. He was not handicapped due to a perceived mental impairment.

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[8]"[T]he employer did not perceive a nonexistent condition that would have constituted an impairment if it did exist, but rather that a condition that did not constitute an impairment was interfering with appellant's capacity to function appropriately in the workplace." (Commission's Interim Decision and Order, p. 22).

[9]Although this is not a case which falls under the Rehabilitation Act of 1973, courts interpreting that statute have held several inherent conditions do not constitute "impairment" within its meaning. de la Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986)(left-handedness); Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985)(crossed eyes); Tudyman v. United Airlines, 608 F. Supp. 739 (D. Cal. 1984)(muscular build).

For all of the foregoing reasons, IT IS HEREBY ORDERED that the decision of the state personnel commission is affirmed and these actions are dismissed.

Dated this 9TH of September, 1994.

BY THE COURT:

P. Charles Jones
Circuit Court Judge